

(4310-G1-P)

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Office of Federal Acknowledgment; Guidance and Direction Regarding Internal Procedures

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Assistant Secretary – Indian Affairs of the Department of the Interior is providing guidance and direction to Office of Federal Acknowledgment (OFA) staff for managing recurring administrative and technical problems in processing petitions for Federal acknowledgment. This guidance and direction does not amend the acknowledgment regulations at 25 CFR part 83.

EFFECTIVE DATE: The guidance and direction defined by this notice are effective on [INSERT FEDERAL REGISTER DATE OF PUBLICATION].

FOR FURTHER INFORMATION CONTACT: R. Lee Fleming, Director, Office of Federal Acknowledgment, MS 34B-SIB, 1951 Constitution Avenue, N.W., Washington, D.C. 20240, telephone (202) 513-7650.

SUPPLEMENTARY INFORMATION:

Introduction

The Department publishes this notice in the exercise of authority under 43 U.S.C. 1457, 25 U.S.C. 2 and 9, 5 U.S.C. 552(a), 5 U.S.C. 301, and under the exercise of authority that the Secretary of the Interior delegated to the Assistant Secretary – Indian Affairs (Assistant Secretary) by 209 Department Manual 8.

This notice supplements the notice published in the **Federal Register** (70 FR 16513) on March 31, 2005, entitled “Office of Federal Acknowledgment, Reports and Guidance Documents, Availability, etc.”

This notice provides the OFA with guidance and direction regarding management of recurring administrative or technical problems in processing petitions for Federal acknowledgment. This guidance and direction is based on interpretation of the acknowledgment regulations. This guidance and direction does not change the acknowledgment regulations, but will assist in making the process more streamlined and efficient, and improve the timeliness and transparency of the process.

The Department developed its Federal acknowledgment regulations, 25 CFR part 83—Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, after notice and substantial public comment, both as to the original regulations and the amended regulations that became effective in 1994. These regulations establish a uniform procedure and fact-based approach to acknowledgment. The Department subsequently published two notices in the **Federal Register** concerning internal procedures for managing and processing petitions. This notice provides additional guidance and direction.

The Department should direct all groups seeking to be acknowledged as Indian tribes to 25 CFR part 83. OFA will provide copies of the regulations and guidelines to any group or individual to assist them in understanding the Department’s regulatory process for Federal acknowledgment. If a group does not meet the seven mandatory requirements for Federal acknowledgment as an Indian tribe, then the Department will inform the petitioner of “alternatives, if any, to acknowledgment” (such as Congressional

legislation) or other means “through which any of its members may become eligible for services and benefits from the Department as Indians” (25 CFR § 83.10(n)).

In the more than 29 years that the Department’s acknowledgment regulations have been in effect, the Department has confronted a number of recurring issues in the administration of the regulations including: the emergence of splinter groups; the administration of technical assistance (TA); requests for expedited processing for uniquely qualified groups, requests for a reduction of the time period for historical evidence; opportunities for streamlining the process through expedited decisions against acknowledgment and decisions against acknowledgment on fewer than all seven criteria; the handling of questionable submissions; and designation of “inactive” status.

GUIDANCE AND DIRECTION

I. Emergence of Splinter Groups

A. Splinter groups that arise after a petitioner submits a letter of intent and **before the Department determines the group is “Ready, Waiting for Active Consideration.”**

Conflicts within a petitioning group that result in multiple and conflicting claims to leadership hamper the ability of OFA to communicate and conduct its business with the group when OFA can not identify a single governing body as the point of contact with the group. OFA should deal with the designated leaders of the group as a whole, not the group’s various members, and should continue to avoid becoming involved in the internal conflicts of a petitioning group. Disputes are matters that must be handled by the group. When OFA finds that conflicting claims to leadership interfere with its ability to conduct its business with the group, OFA should not devote its expertise and resources to the group’s petition.

In order to be able to work with the one duly authorized governing body of a petitioner when these leadership disputes occur, OFA may request the following information from the group:

- (1) The current governing document, and all past governing documents;
- (2) The current membership list that is certified as accurate as of a specific date, and all past membership lists;
- (3) Completed consent forms from every member. A consent form should be signed by each individual and should state that he or she voluntarily wishes to belong to the group. A parent should sign for his or her minor children individually or the legal guardian or representative transacting for that minor child or individual should sign. In the latter instance, the group should submit a copy of the legal document allowing that representation;
- (4) Copies of the all minutes of meetings of the group's governing body since the filing of the letter of intent;
- (5) Copies of documents reflecting changes in the composition of the governing body since the filing of the letter of intent, such as published election results, minutes, newspaper articles, or newsletters; and
- (6) Any court order determining the legitimate leadership of the group.

Until this material is received and the leadership split is resolved, OFA should not expend time on the petitioner. The submissions should be reviewed by the appropriate OFA researchers, when available, recognizing that, under the regulations, the Department's top priority is processing petitions on active consideration, followed by those petitions on the "Ready, Waiting for Active Consideration" ("Ready") list. If an

OFA review of the submitted information identifies a governing body agreed upon by the group's members, then OFA may contact the petitioner.

Some petitioning groups attempt to resolve their disputes by splitting into two or more groups, not realizing that, by doing so, neither group may be able to meet the criteria. The Department does not acknowledge parts of an Indian tribe. Therefore, the groups should be encouraged to work together for the long term, recognizing that there may be circumstances in which the separation is appropriate to reflect an actual group that might meet the regulatory criteria.

B. Splinter groups that emerge **after** the Department determines the petitioner is “Ready, Waiting for Active Consideration.”

If a group on the “Ready” list of petitioners experiences internal disputes, then OFA should advise the group that these disputes jeopardize its placement on this “Ready” list and its priority position on this list. When a group tries to resolve its disputes by splitting into two or more groups, OFA also should advise the group that the result of dividing into two or more may be that the individual subgroups may not be able to meet the criteria. Again, the Department does not acknowledge parts of an Indian tribe.

OFA should recommend that the group resolve its disputes in a timely manner and submit the requested information, as outlined above in the previous section, in a timely manner. If the information is not received, or if the dispute is not resolved in a timely fashion, OFA, in its discretion in managing its workload, may decide not to move the group to active consideration or may decide to remove it from the “Ready” list because it is no longer ready for evaluation. If the leadership dispute still results in two petitioners, OFA may, in its discretion in managing its workload, recommend that the two

petitioners be evaluated together if both are “ready” to proceed to active consideration or may proceed with one petitioner if the other is not “ready.” OFA should not, however, allow itself to be used as leverage by one portion of the petitioning group to further its position with the remainder of the group. Therefore, OFA may determine whether it can proceed with the evaluation.

When and how OFA will respond to a group’s leadership disputes and emergence of splinter groups and its submissions will depend entirely on the facts of the situation, availability of OFA’s professional staff members, their recommendations, and OFA’s pending workload priorities. OFA’s priority remains to process petitions on active consideration.

II. Handling Petition Documentation When a Dispute Arises

The Department will treat claimed separate governing bodies within the same petitioner as separate parties for purposes of the disclosures under the Freedom of Information Act (FOIA). The Department will redact or withhold personal information that one governing body submits from the other governing body that may be requesting copies of such documents. Under FOIA, members of the group or members of the public may request in writing copies of documents submitted in relation to the petition. Petition documentation is a public record subject to release under FOIA unless an exemption applies. Certain personal records, such as membership lists and genealogical information, may be protected from disclosure by law. The Department will release copies of all records requested that are not affected by the exemptions under FOIA.

III. Technical Assistance

Under 25 CFR part 83, OFA provides technical assistance (TA) reviews of

materials that are submitted by a petitioning group. As part of this TA review, OFA should indicate the time periods under the specific criteria for which there is little or no evidence submitted and set a time period for response. If a petitioning group needs additional time to respond, the group should provide a research plan of action. Under most circumstances, if a timely response is not received, then OFA should designate a petitioner as “inactive.”

IV. Expedited Processing

If a preliminary review indicates that the group appears to meet criteria 83.7(e), 83.7(f), and 83.7(g), subject to a full review under the criteria on active consideration, OFA should recommend a waiver of the priority provisions in the regulations to move to the top of the “Ready” list (1) any group that can show residence and association on a state Indian reservation continuously for the past 100 years, or, (2) any group that voted in a special election called by the Secretary of the Interior under section 18 of the Indian Reorganization Act (IRA) between 1934 and 1936, provided that the voting Indian group did not organize under the IRA. This waiver of the priority provisions should be recommended only if a preliminary review indicates that a predominant portion of the group’s current members appears to descend from a representative portion of persons on a 1910 or earlier governmental or tribal list of the residents of the State reservation, or that a predominant portion of the group’s current members appears to descend from a representative portion of a list of voters on the IRA. This provision is for purposes of priority placement on the “Ready” list and does not revise the required evaluation under the criteria.

V. Reducing the Time Period for which Petitioners Must Submit Evidence

“First sustained contact” is defined in part in the regulations as “the period of earliest sustained non-Indian settlement and /or governmental presence in the local area.” The purpose of the evaluation under the regulations is to establish that an Indian tribe has existed continuously and is entitled to a government-to-government relationship with the United States. In order to reduce the evidentiary responsibilities of the petitioner, it is reasonable to interpret the regulations as requiring the petitioner to document its claim of continuous tribal existence only since the formation of the United States, the sovereign with which it wishes to establish a government-to-government relationship. The Constitution was ratified March 4, 1789, and provides in Article I, Section 8, clause 3, that Congress has the power to regulate commerce with the Indian tribes. Therefore, if the petitioner was an Indian tribe at that time the Constitution was ratified, its prior colonial history need not be reviewed. The date of “the period of earliest sustained non-Indian settlement and/or governmental presence in the local area,” thus, should be on or after March 4, 1789, reducing the time period for which petitioners should submit evidence.

VI. Expedited Findings Against Acknowledgment

The Department may issue an expedited proposed finding against Federal acknowledgment under section 83.10(e), prior to placing the group on the Ready list. OFA may prepare an expedited proposed finding as appropriate, once a petitioner has formally responded to a TA review letter or when a petitioner requests to be placed on the “Ready” list or states in writing in a document certified by the petitioner’s governing body that the petition is complete or that the Assistant Secretary should proceed with the active consideration of the petition.

VII. Decision Against Acknowledgment Based on Failure to Meet Fewer than Seven Criteria

If during the evaluation of a petition on active consideration it becomes apparent that the petitioner fails on one criterion, or more, under the reasonable likelihood of the validity of the facts standard, OFA may prepare a proposed finding or final determination not to acknowledge the group on the failed criterion or criteria alone, setting forth the evidence, reasoning, and analyses that form the basis for the proposed decision. This process should be used to increase the speed of the decision-making process and better utilize the time and expertise of OFA professional staff. Thus, this process is most appropriate when the deficiency becomes apparent during the initial stages of active consideration.

If a proposed finding against acknowledgment is issued on fewer than seven criteria and if, following an evaluation of the evidence and argument submitted during the comment period, it is determined that the petitioner meets the criterion or criteria, then the Assistant Secretary will issue an amended proposed finding evaluating all seven criteria.

VIII. Integrity

If OFA suspects that a petitioner may be involved in illegal activities or has submitted fraudulent documents for the Federal acknowledgment process, OFA should continue to refer any such matters to the Office of the Solicitor and Inspector General to seek appropriate action (such as investigation, prosecution, or other action).

IX. “Inactive” Status

In order to more accurately gauge its workload, OFA should modify its “Status Summary” publication to include only those petitioners that have submitted a documented petition and responded to a TA review letter. The “register of letters of

intent or incomplete petitions” maintained under § 83.10(d) should be maintained separately and include a category of “Inactive Petitioners.” This inactive category should include those petitioners that have not responded in two years to a TA review, have missed suggested deadlines for responding to the TA review, or have missed deadlines in its approved research plan of action. It should also include those petitioners that have submitted only a letter of intent, or are not otherwise ready for the initial TA review.

Dated: May 16, 2008.

Carl J. Artman
Assistant Secretary – Indian Affairs

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